U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-T- INC.

DATE: DEC. 2, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology consulting and software development services, seeks to permanently employ the Beneficiary as a senior Java developer II. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This category allows a U.S. employer to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

On May 26, 2016, the Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the Beneficiary's possession of the educational requirements of the offered position and the requested classification.

The matter is now before us on appeal. We agree with the Petitioner that the Beneficiary possesses the educational requirements of the offered position and the requested classification. But the record does not establish the Petitioner's ability to pay the proffered wage. Upon *de novo* review, we will therefore remand the matter to the Director.

I. LAW AND ANALYSIS

A. USCIS' Role in the Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, a foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

By approving the accompanying ETA Form 9089, Application for Employment Certification (labor certification) in the instant case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of senior Java developer II. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(II).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

B. The Beneficiary's Possession of the Educational Requirements

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith,* 696 F.2d at 1012-13; *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

Also, a labor certification accompanying a petition for an advanced degree professional must establish that the offered position requires the services of a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(4)(i). The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. 204.5(k)(2).

In the instant case, the petition's priority date is July 21, 2015, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The labor certification states the minimum requirements of the offered position of senior Java developer II as a U.S. bachelor's degree or a foreign equivalent degree in computer science, computer engineering, mathematics, or any other engineering field, plus 60 months of Java development experience. The labor certification also states the employer's acceptance of an

alternate combination of education and experience in the form of a master's degree with no experience.

In addition, Part H.14 of ETA Form 9089 states that the offered position requires:

> expertise in Design and Development of N-Tier Applications using Java/J2EE Technologies such as java, Jsp, Struts, Spring, Hibernate, MVC Framework, Javascript Libraries like JQuery, Websphere, Eclipse, SOAP, XML, Web Services and RESTful Webservices for Enterprise Java Platform, Experience in implementing SSO using OAuth Flow 2.0, Ability to Develop Proof of Concepts and provide Guidance to the Development Team and other stake holders.

The Petitioner asserts the Beneficiary's possession of the offered position's primary requirements of a bachelor's degree plus 60 months of Java development experience. Before obtaining the requisite experience, the Beneficiary attested on the accompanying labor certification to his receipt of a bachelor's degree in engineering technology in 2005 from

A copy of an diploma indicates the Beneficiary's receipt of a bachelor of science degree in engineering technology on August 25, 2005. transcripts indicate the Beneficiary's completion of six semesters of study from 2002 to 2005.

The Petitioner also submitted a copy of an The certificate indicates the Beneficiary's receipt of a 3-year diploma in mechanical engineering from a polytechnical school in 1996. A March 20, 2013, evaluation of the Beneficiary's foreign educational credentials concludes that the Beneficiary possesses the equivalent of a U.S. bachelor of science degree in engineering technology.

Noting the Beneficiary's studies at the institute for six semesters from 2002 to 2005, the Director found that the Beneficiary holds a 3-year bachelor's degree. The Director concluded that the combination of the Beneficiary's bachelor's degree and polytechnical diploma did not constitute the foreign equivalent of a single bachelor's degree as stated on the accompanying labor certification and required for the requested classification.

The Director correctly stated that advanced degree equivalents must generally consist of single, 4-year bachelor's degrees. U.S. bachelor's degrees generally require 4 years of study. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977).

Also, the plain language of the regulations indicates the unacceptability of baccalaureate degrees

[1] Under section 3 of the Indian University Grants Commission Act, is deemed to be a university. *See* Facts & History, at (last visited Nov. 30, 2016).

based on combinations of degrees, or combinations of education and experience. As previously indicated, the term "advanced degree" includes a U.S. "baccalaureate degree or foreign equivalent degree" followed by at least 5 years of progressive experience in the specialty. The regulations' repeated use of the term "degree" in singular number suggests the acceptance of only a single degree or its foreign equivalent.

In addition, the Act's legislative history indicates that combinations of lesser educational credentials, or combinations of education and experience, do not constitute baccalaureate equivalents. In response to public criticism that the regulations bar the substitution of experience for baccalaureate education in immigrant visa petitions, the former Immigration and Naturalization Service (INS) reviewed the Immigration Act of 1990, Pub. L. 101-649. The INS concluded that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

The accompanying labor certification also indicates that the offered position primarily requires a single baccalaureate degree or a single foreign equivalent degree. In Part H.4 of the ETA Form 9089, the Petitioner indicated the minimum level of required education as a "[b]achelor's" degree, rather than some "[o]ther" degree equivalent.

But, contrary to the Director's decision, the record establishes the Beneficiary's possession of a single, foreign degree equivalent of a U.S. bachelor's degree. The record indicates that the Beneficiary's Indian bachelor of science degree equates to a 4-year, U.S. bachelor of science degree.

The record indicates that, after 10 years of schooling, the Beneficiary pursued polytechnical education in mechanical engineering. As indicated in the 2013 evaluation and an evaluation and expert opinion submitted by the Petitioner in response to the Director's notice on intent to deny (NOID) dated April 14, 2016, the Beneficiary's 3-year polytechnical diploma allowed his admission into the second year of the 4-year bachelor of science program at the institute. in 2007 issued regulations adopting this type of "lateral entry" into university engineering and technology programs on a nationwide basis. *See* 2007); *see also* at (accessed Sept. 16, 2016).

The Electronic Database for Global Education (EDGE), which federal courts have found to be a reliable, peer-reviewed source of online information about foreign degree equivalencies, also supports the Beneficiary's possession of a single bachelor's degree. *See, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (holding that USCIS may discount letters and

evaluations submitted by a petitioner if they differ from reports in EDGE, which is "a respected source of information").[2]

EDGE states that a 3-year, Indian engineering diploma equates to 1 year of university in the United States, noting that "[u]ndergraduate credit is taken from the final year of the three-year program." AACRAO EDGE, at http://edge.aacrao.org/country/credential/diploma-in-engineering?cid=single (last visited Nov. 30, 2016). EDGE also states that an Indian bachelor of engineering/technology degree is comparable to a U.S. bachelor's degree. AACRAO EDGE, at http://edge.aacrao.org/country/credential/bachelor-of-engineeringtechnology?cid=single (last visited Nov. 30, 2016).

The Beneficiary's post-polytechnical studies are analogous to a transfer from one undergraduate school to another, or from a U.S. community college to a university. Although the Beneficiary studied only 3 years at the university that issued his baccalaureate diploma, the record indicates that his degree reflects 4 years of undergraduate studies.

As required for advanced degree classification and as specified by the accompanying labor certification, the record establishes the Beneficiary's possession of a foreign equivalent of a U.S. bachelor's degree in a specified field.[3] We will therefore withdraw the Director's decision regarding the Beneficiary's educational credentials.

C. The Petitioner's Ability to Pay the Proffered Wage

Although the Petitioner has established the Beneficiary's qualifications for the proffered job, the record does not establish the Petitioner's continuing ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the labor certification states the proffered wage of the offered position of senior Java developer II as $105,000 per year. As previously indicated, the petition's priority date is July 21, 2015. Because complete evidence of the Petitioner's ability to pay the proffered wage in 2016 is not yet available, we will consider the Petitioner's ability to pay only in 2015, the year of the petition's priority date.

---

[2] EDGE was created by the American Associate of Collegiate Registrars and Admissions Officers (AACRAO), a non-profit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals representing more than 2,600 institutions worldwide. *See* AACRAO, at http://www.aacrao.org/About-AACRAO.aspx (last visited Nov. 30, 2016).

[3] The record also establishes the Beneficiary's possession of the experience and special skills required for the proffered job.

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the annual proffered wage and the wages paid. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[4]

In the instant case, the Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, for 2015. The Form W-2 indicates the Petitioner's payment to the Beneficiary in 2015 of $66,321.20.

The amount on the Form W-2 does not equal or exceed the annual proffered wage of $105,000. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages paid to the Beneficiary.

But we credit the wages paid to the Beneficiary. The Petitioner therefore need only establish its ability to pay the difference between the annual proffered wage and its payment to the Beneficiary in 2015, or $38,678.80.

The Petitioner's federal income tax return reflects net income in 2015 of $322,532.[5] This amount exceeds the difference between the annual proffered wage and the Petitioner's payment to the Beneficiary in 2015. The record therefore appears to establish the Petitioner's ability to pay the proffered wage.

As stated in the Director's decision and NOID, however, USCIS records indicate the Petitioner's filing of multiple Forms I-140, Immigrant Petitions for Alien Workers. In response to the Director's NOID, the Petitioner identified nine other petitions that remained pending after the instant petition's priority date.[6]

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from the petition's priority date onward. 8 C.F.R. § 204.5(g)(2). The Petitioner must therefore demonstrate

[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[5] For income tax purposes, the record indicates the Petitioner's treatment as an S corporation. S corporations with adjustments to their incomes from sources outside of their trades or businesses reconcile their net income amounts on Schedule K to IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* Internal Revenue Serv., Instructions to Form 1120S, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Nov. 30, 2016). In 2015, the Petitioner's tax return indicates adjustments to its net income from sources outside of its business. We therefore consider line 18 of Schedule K of the Petitioner's income tax return to reflect its net income for 2015.

[6] We exclude a tenth petition identified by the Petitioner. The Petitioner filed that petition after the instant petition's priority date, but the petition was denied.

its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

The Petitioner's list of other pending petitions includes three petitions that USCIS records indicate the Petitioner did not file until 2016.[7] Because we are not determining the Petitioner's ability to pay the proffered wage in 2016, we will not consider these three petitions.

But the Petitioner's list excludes four other petitions that USCIS records indicate remained pending after the instant petition's priority date.[8] The record does not indicate the proffered wages or priority dates of these additional four petitions, or whether the Petitioner paid any of the petitions' beneficiaries in 2015. The record also does not indicate whether any of the beneficiaries obtained lawful permanent residence, or whether their petitions were denied, withdrawn, or revoked. Without this information, the record does not establish the Petitioner's ability to pay the proffered wage.

Of the remaining beneficiaries identified by the Petitioner, the record does not support the wages the Petitioner claims to have paid three of them in 2015. Specifically, the Petitioner claims to have paid the beneficiary of [redacted] a total of $88,800. But a copy of that beneficiary's Form W-2 for 2015 indicates paid wages of only $69,640. Similarly, the Petitioner claims payments to the beneficiaries of [redacted] and the instant petition of $81,264 and $93,792, respectively. But their 2015 Forms W-2 reflect respective wages of only $77,264 and $66,321.20.

The following table indicates the proffered wages and wages paid in 2015 to the beneficiaries identified by the Petitioner:

Receipt Number	Proffered Wage	Wages Paid in 2015
[redacted]	$115,000	$0
	$102,315	$ 77,264.00
	$115,000	$ 82,603.20
	$115,000	$ 90,255.00
	$104,437	$ 69,640.00
	$ 91,499	$219,250.00
Instant Petition	$105,000	$ 66,321.20
Total	**$748,251**	**$605,333.40**

[7] USCIS records identify these three petitions by the following receipt numbers: [redacted] and [redacted]

[8] USCIS records identify these four petitions by the following receipt numbers: [redacted] and [redacted]

As the table indicates, the difference between the combined proffered wages and the wages paid by the Petitioner in 2015 is $142,917.60 ($748,251 – $605,333.40). The Petitioner's 2015 net income of $322,532 exceeds the difference. The Petitioner therefore appears to have the ability to pay the combined proffered wages in 2015.

But the table does not include the proffered wages of the beneficiaries of the four additional petitions that remained pending after the instant petition's priority date. The record therefore does not establish the Petitioner's ability to pay the proffered wages of all applicable beneficiaries.

Because the record does not establish the Petitioner's ability to pay the proffered wage, we will remand the matter to the Director.

II. CONCLUSION

The record establishes the Beneficiary's possession of the educational qualifications for the offered position and the requested classification. We will therefore withdraw the Director's decision. But the petition is not approvable. We will therefore remand the matter to the Director for further proceedings.

On remand, the Director should notify the Petitioner of additional evidence needed to demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its petitions that remained pending after the instant petition's priority date. The Director should also notify the Petitioner that it may submit additional evidence of its ability to pay, including evidence pursuant to *Sonegawa.*

The Director may also request evidence addressing any other issues he may identify. He should afford the Petitioner a reasonable opportunity to respond. Upon receipt of the Petitioner's response, the Director should review the entire record and enter a new decision.

ORDER: The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing decision and for the entry of a new decision.

Cite as *Matter of S-T- Inc.*, ID# 47847 (AAO Dec. 2, 2016)